administrative steps required to exercise a power to levy charges, then its exercise of that power is unauthorised.

Yet this exclusion of hypotheticals may not be as definitive as it seems. Following *Vodafone*, courts will in future assess the amount of charges that defendants could lawfully levy. It is conceivable that they may allow public body defendants the benefit of the doubt where they have not taken minor administrative steps to act on existing legislation. For instance, as the trial judge posited, a public body might omit minor formalities because it believed it was applying different rules. To what extent will the principle of legality as it operates in this private law context allow judges to overlook the non-completion of procedural requirements? Public law approaches concerning minor procedural defects may influence the assessment of what could lawfully be charged.

Lastly, a potentially interesting question remains concerning counter-restitution for benefits received in exchange for unlawful levies. In *Vodafone*, Ofcom chose not to seek counter-restitution for the value of the licences, preferring its netting-off argument based on a counterfactual valuation. In any event, as these claimants were liable for the fees set by the operative 2011 Regulations, they did not receive a valuable benefit free of charge. Were this otherwise, would the public authority be entitled to counter-restitution of the value of the benefit conferred by it (i.e. the licence), or might counter-restitution in some cases run up against an objection that it would undermine the principle of legality?

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REFLECTIVE LOSS IN THE UK SUPREME COURT

AT first glance the reflective loss rule is simple: if a wrongdoer is in breach of independent duties owed to a company and its shareholder, the shareholder is not entitled to claim loss that "reflects" the company's loss. But the rule's murky multiplicity of rationales has allowed its scope to widen alarmingly since its articulation in *Prudential Assurance Co. Ltd. v Newman Industries Ltd.* [1982] Ch. 204. It is timely, then, that the Supreme Court in *Marex Financial Ltd. v Sevilleja* [2020] UKSC 31 grappled with what Tettenborn described as "ghastly legal Japanese knotweed".

The facts were striking. The creditor-claimant received a substantial judgment against a company incorporated in the British Virgin Islands. The defendant, the controller of the company, allegedly asset stripped it shortly after judgment, rendering the claimant's judgment debt worthless.

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On an application to set aside service outside of jurisdiction of claims made in tort directly against the defendant, the defendant argued that the claim could not succeed because the claimant's loss was reflective of the company's. This argument was rejected in the High Court, but the Court of Appeal, applying case law following *Prudential*, agreed with the defendant.

Two issues of law arose on appeal. The first – whether the reflective loss rule applied to claims by creditors, such as the claimant – attracted the most discussion. The court was unanimous that its expansion to non-shareholder claimants had produced "unwelcome and unjustifiable effects on the law" (Lord Hodge, at [95]). The appeal was therefore successful. This rendered discussion of the second issue – the scope of exceptions to the rule – unnecessary for the appeal's disposition.

The justices were divided on whether a more narrowly circumscribed rule should be retained. Three speeches were given: the plurality's (Lord Reed, with whom Lady Black and Lord Lloyd-Jones agreed), the minority's (Lord Sales, with whom Lord Kitchin and Baroness Hale agreed), and Lord Hodge's (agreeing with the plurality).

The plurality considered that the rule should remain, but it should only bar claims by shareholders for loss suffered in their capacity as shareholders that was not separate and distinct from the company's loss. Explaining the plurality's reasoning requires us to disentangle two apparent problems whose solution previously formed part of the orthodox explanation for the rule.

The first is the problem of double recovery. This is an issue that arises downstream, at judgment, and is dealt with procedurally at trial or by the law of damages. The plurality rejected this as an explanation for the reflective loss rule, because the rule applies even when the risk of double recovery has abated, such as when the company's claim is time-barred: at [55].

The second is the "problem" of double duties. This is an issue that arises upstream, at breach. If a defendant breaches duties to a company and a shareholder, it arguably owes duties to pay damages to both simultaneously, with respect to the same loss. The reflective loss rule prevents this intolerable situation from arising. It also prevents double recovery from arising downstream. Moreover, nothing is lost by denying the shareholder's claim. The duty to pay damages to the company and shareholder concern the same loss, that is, the shareholder's loss in share value correlates with the company's loss in its net assets. As payment of damages to the company necessarily compensates the shareholder, the duty to pay damages to the shareholder is unnecessary for the law to achieve full compensation.

The plurality rejected this last step; there is, in fact, no direct correlation between company and shareholder losses. Further, barring claims to prevent defendants from owing double duties would bar *any* claimant for reflective loss. This effect is "unjustifiable": there is no good reason why reflective

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losses suffered by non-shareholder claimants should be deemed irrecoverable in preference to the company's.

There is another solution to the "problem" of double duties. The problem is premised on the idea that contractual or tortious duties transform immediately upon breach into duties to pay damages. Smith, drawing on Gardner, describes this as the "continuity thesis". An alternative (preferable) view is that a breach of duty gives rise to a mere liability on the defendant to pay damages, with the duty to pay arising on judgment: see Stephen Smith, *Rights, Wrongs, and Injustices* (Oxford 2019). On this view, the "problem" of double duties does not arise as such.

The plurality sought safer ground in reinterpreting the rule as part of company law. It described the rule as principally concerned with protecting the rule in *Foss v Harbottle* (1843) 67 E.R. 189. They say shareholders might interfere or undermine the company's own claim, if they were not barred from bringing their own personal action for losses suffered in their capacity as shareholders.

This reasoning cannot, by itself, sustain a bar against recovery of reflective loss. The plurality recognised that a claim is available if the company does not have its own cause of action against the defendant (i.e. when *Foss v Harbottle* is not engaged). The plurality also did not dismiss the possibility of claims for reflective losses which are crystallised via share sales (cf. minority, at [158]). The plurality's reasoning arguably supports a narrower rule: a shareholder will be disabled from bringing a claim for reflective loss when the claim serves no legitimate purpose other than to circumvent *Foss v Harbottle*. If adopted, this approach could achieve practical justice without equating the shareholder's economic and legal interests with the company's, thereby upholding the fundamental principle of separate corporate personality.

Little, then, remains to justify the reflective loss rule. The "problem" of double duties could (if real) explain it, but as noted above this problem is premised on the possibly misconceived "continuity thesis". The plurality recognised pragmatic advantages in a bright line; certainly, it avoids debate as to what constitutes an impermissible attempt to circumvent *Foss v Harbottle*. Pragmatism remains the rule's most persuasive justification. But as the minority argues, pragmatism alone is an unsatisfying reason to deny rights of action.

The plurality's bright-line approach led to its regrettable rejection of the exception to the rule, recognised in *Giles v Rhind* [2003] Ch. 618, that a claim for reflective loss may be permitted if the defendant's wrongful conduct had prevented the company from pursuing its claim. But if a reflective loss claim is available when a company does not have its own cause of action, and so long as there is no sense that the shareholder-claimant's loss must be deemed out of existence to avoid the (arguably non-existent) problem of double duties, a claim should be available if the company is

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disabled by the defendant from pursuing its own cause of action. In both cases the company's autonomy to pursue its own claim (and, therefore, the rule in *Foss v Harbottle*) is not undermined. Similar analogical reasoning was deployed in *Giles*: at [35] (Waller L.J.).

Lord Hodge, describing the rule as having broken free of its moorings in company law, agreed for the reasons given by the plurality that the appeal should be allowed. However, the plurality's rejection of *Giles* was unnecessary for the appeal to be allowed, and Lord Hodge did not comment on any of the rule's exceptions. As the minority declined to address the exception, *Giles* therefore remains (arguably) binding on lower courts. This should be welcomed; its removal was not argued for at the oral hearing, and as the minority forcefully argues, if a bright-line rule produces simplicity at the cost of working serious injustice, the rejection of the *Giles* exception will exacerbate the problem: at [167], [212].

The minority argues that, on inspection, none of the policy reasons articulated in favour of the reflective loss rule justify its retention. The price of a bright-line rule is too high: at [192]. Its reasons are compelling, but unfortunately it does not discuss in detail how the plurality's concerns regarding the protection of *Foss v Harbottle* can be met.

The minority discussed the possibility of using procedural means to manage double liability issues and subrogation to protect the interests of third-party creditors and shareholders. The situation contemplated is a defendant, committing a wrong against a company and its creditor, pays off the creditor for losses on its debts, which were caused by the defendant's wrong. Arguably, the defendant could be subrogated to the creditor's subsisting debt, which it could then claim from the company subject to any cross-claim the company might have against the defendant for damages. Subrogation to subsisting rights is a tightly restrained doctrine, but the minority also left open the alternative of subrogation to extinguished rights: at [205]. Intriguingly. Lord Hodge suggested the minority might well be right about these alternative options, and the plurality also expressly left open the possibility that subrogation may provide a solution to issues of double recovery arising in connection with creditors' claims: at [88].

Lord Reed described the reflective loss rule as "one of the most important and difficult questions of law to come before the Supreme Court for some time". Let us hope that it is not the last word from the justices on this most fascinating issue.

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